

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff/Respondent,

Case. No. 16-20068

v.

Honorable Thomas L. Ludington
Magistrate Judge Patricia T. Morris

DANIEL FUCUNDO,

Defendant/Petitioner.

**ORDER ADOPTING REPORT & RECOMMENDATION AND DENYING
PETITIONER'S MOTION TO VACATE**

Petitioner pled guilty to count two of an indictment charging him with being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g) pursuant to a Rule 11 plea agreement on October 1, 2018. ECF No. 26. On February 8, 2019, Petitioner was sentenced to 120 months of incarceration to be followed by two years of supervised release. ECF No. 32, PageID.144–145. Petitioner did not file an appeal.

On January 23, 2020, Petitioner filed the instant motion to vacate his sentence. ECF No. 33. The motion was referred to Magistrate Judge Morris for report and recommendation. ECF No. 39. On March 17, 2020 the government responded. ECF No. 40. On May 12, 2020, Magistrate Judge Morris issued her report recommending that Petitioner's motion to vacate be denied. ECF No. 41. On June 23, 2020 Petitioner's late reply was docketed and dated June 2, 2020 based on the date it was mailed. ECF No. 42.

Although the magistrate judge's report states that the parties to this action could object to and seek review of the recommendation within fourteen days of service of the report, neither party timely filed any objections. Even allowing additional time for mail delays due to covid-19, neither

party filed objections to the report and recommendation. The election not to file objections to the magistrate judge's report releases the Court from its duty to independently review the record. *Thomas v. Arn*, 474 U.S. 140, 149 (1985). The failure to file objections to the report and recommendation also waives any further right to appeal. *Id.* As such, the Court concludes that Petitioner has failed to make a substantial showing of the denial of a constitutional right, and a certificate of appealability is not warranted in this case. The Court further concludes that Petitioner should not be granted leave to proceed *in forma pauperis* on appeal, as any appeal would be frivolous. *See* Fed. R. App. P. 24(a).

Accordingly, it is **ORDERED** that the Magistrate Judge's report and recommendation, ECF No. 41, is **ADOPTED**.

It is further **ORDERED** that Petitioner Fucundo's Motion to Vacate his sentence, ECF No. 33, is **DENIED**.

It is further **ORDERED** that a certificate of appealability is **DENIED**.

It is further **ORDERED** that leave to proceed *in forma pauperis* on appeal is **DENIED**.

Dated: July 10, 2020

s/Thomas L. Ludington
THOMAS L. LUDINGTON
United States District Judge

PROOF OF SERVICE

The undersigned certifies that a copy of the foregoing order was served upon each attorney of record herein by electronic means and to **Daniel Luis Facundo** #05845-480, MCKEAN FEDERAL CORRECTIONAL INSTITUTION, Inmate Mail/Parcels, P.O. BOX 8000, BRADFORD, PA 16701 by first class U.S. mail on July 10, 2020.

s/Kelly Winslow
KELLY WINSLOW, Case Manager